IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NO.

F. F. DOLLERT, ET AL

Petitioner

v.

PRATT-HEWIT OIL CORPORATION ET AL

Respondent

BRIEF OF PETITIONER

I.

History of the Litigation

The original petition Fed. Tr. R. 186-222) in this case of *W. E. Hewit* v. *Pratt-Hewit Oil Corporation et al* was filed in the District Court of Refugio County, Texas, in September, 1927, Case No. 795. This originally was a class action brought by

W. E. Hewit and all the stockholders similarly situated of the Pratt-Hewit Oil Corporation, hereinafter referred to as the Pratt-Hewit Corp, to cancel the September 28, 1925 contract. The stockholders, who numbered more than 400, with but a few exceptions, lived in Wisconsin. The other defendants in the case were the Houston Oil Company of Texas and all the directors and officials of the Pratt-Hewit Corp. The original petition of W. E. Hewit is to be found in full on pages 186 to 222 of the Fed. T. of R.

F. F. Dollert, of Wisconsin, petitioner herein, intervened with his attorney, a Mr. Boothe of San Antonio, Texas, and adopted as his petition the petition of W. E. Hewit. Likewise, five other Wisconsin stockholders intervened and adopted Hewit's petition as theirs.

Defendants filed a plea in abatement praying for dismissal of the case. The Pratt-Hewit Corp was organized under the laws of Delaware and was doing business in Texas without having secured a permit from the Secretary of State of Texas and therefore was barred by statute from bringing and prosecuting any suit in Texas courts. It was contended by the defendants that as the corporation could not maintain the suit, its stockholders could not maintain the suit in its behalf. The District Court sustained the motion to dismiss. The Court of Civil Appeals reversed the decision of the District Court. 35 S. W. 2d, p. 787. The Supreme Court of Texas

affirmed the latter's decision by an opinion. 52 S. W. 2d 64.

On January 26, 1937, in vacation time, the stockholders' action was taken up and dismissed with prejudice (Tr. R. p. 32 to 37) upon stipulation between plaintiff Hewit, the five intervening stockholders as plaintiffs, and the Houston Oil Company, Thomas H. Pratt, and the other officials and directors who had made their appearance as defendants. No notice was given to intervenor F. F. Dollert and his attorney and also none was given to any of the other 400 stockholders. An answer was filed, purporting to be that of the Pratt-Hewit Corp., sworn to by Pratt, a defendant, and signed by Pratt's personal attorney who also filed an answer for Pratt individually which was sworn to by Pratt, (Tr. of R. 36) although the Pratt-Hewit Corp. was the true plaintiff and Pratt a defendant.

In September, 1939 or thereabouts, through E. H. Buckner, the former president of the Houston Oil Company, the official who represented that defendant in making the September 28, 1925 contract, made a statement that the Houston Oil Company, at the time said contract was made, had paid to Thomas H. Pratt $50,000. in cash for a 7/32 interest in the A. D. Rooke lease, which interest cost Pratt nothing, as A. D. Rooke, from whom Pratt received his interest, later testified in the Federal Court, Fed. Tr. R. p. 836) and that Buckner himself had paid Pratt approximately $18,000. for a 4/32 interest in the same lease. Upon this informa-

tion, suit was filed by stockholder Wert T. Reed in the United States District Court, Southern District, at Victoria, Texas, and was transferred to Houston. Upon order of the Court, the Houston Oil Company produced Exhibits 3 to 8, inclusive, described in petitioner's proposed amended petition. (Tr. R. 10 to 17) secret contracts and secret oil and gas lease assignments entered into between the Houston Oil Company, Pratt, and A. D. Rooke, the party used to smoke-screen the deal. These instruments, although they are such as oil men and oil companies never fail to put of record, have never been recorded by the Houston Oil Company and Pratt.

Upon order of Court, plaintiff in the Federal Court case examined the book of the Houston Oil Company and found that it had accommodated Pratt with four loans, totaling $14,500., two given before and two after the September 28, 1925 contract was made. (Fed. Tr. R. 768-774)

The case was tried before the court, the Hon. James V. Allred presiding. A number of technical findings were made by the Court, such as that no demand was first made upon the directors before suit was commenced, that Wert T. Reed was not a stockholder at the time when the alleged fraudulent acts were committed, that plaintiffs could easily have discovered the fraud, that the judgment entered by the District Court of Refugio County on January 26, 1937, Case No. 795, was res judicata. But no finding was made whatsoever of the issues

presented by the petitioner to dismiss the judgment entered January 26, 1937, except that there was no fraud. The case was therefore dismissed.

None of the issues on which petitioner rests this application for certiorari were in fact decided at all and they remain until this day undecided.

An appeal was taken to the Circuit Court of Appeals of the Fifth Circuit. It affirmed the judgment of the District Court. The following is the opinion:

> "It is claimed by appellants that the contract and leases were secured by fraud, part of which consisted in bribing a corporate officer. Many issues were presented and many defenses raised in the court below, but appellees' real defense was that there was no fraud. No good could result either from re-stating the pleadings or reviewing the evidence in this case. The findings and conclusions of the district court are free from error, and the judgment appealed from is affirmed." 132 Fed. 2d 748.

Application for writ of certiorari was made to this Court and was denied. In July, 1943, F. F. Dollert, petitioner, filed his motions which were all to the effect that the September 28, 1925 contract was void, being prohibited by Texas Statutes and public policy, and that the alleged judgment entered in this original case of *Hewit et al* v. *Pratt-Hewitt Corp et al* filed in September, 1927 and dismissed in vacation time on January 26, 1937, are both void. The District Court, upon a very brief and perfunc-

tory hearing of the motion, rendered judgment as follows:

> "It is, therefore, ORDERED, ADJUDGED and DECREED by the Court this 18th day of October, A.D. 1943, that said motions be, and they are hereby, dismissed for lack of jurisdiction; and, further, that if the Court have jurisdiction over said motions, they are hereby denied and overruled for lack of merit." (Tr. R. 28 to 29)

II.

Opinion of the Court of Appeals

The opinion of the Court of Civil Appeals in the above entitled matter in the said Court of Civil Appeals is contained on pages 39 to 42 of the Transcript of Record.

III.

Jurisdiction

The Court of Civil Appeals affirmed the judgment of the District Court on March 8, 1944. The motion for a rehearing was overruled April 5, 1944. Application for Writ of Error was denied for want of merit, May 31, 1944. Motion for Rehearing was refused on September 27, 1944.

This Court has jurisdiction by virtue of 28 U. S. C., Sect. 344 (Sec. 237 Jud. Code Amended) Subdi-

vision (b) and the 14th Amendment of the Constitution of the United States. For further statement as to jurisdiction see what is said under heading II in the petition. In interest of brevity the statement is not repeated at this point.

IV.

Statement of the Case

The statement of the case is given under heading No. I in the petition. In the interest of brevity the statement is not repeated at this point.

V.

Specification of Errors

1. The Court of Civil Appeals erred because it refused to judicially determine the jurisdictional question presented to it, namely, that the September 28, 1925 contract unlawfully attempts to delegate the managerial powers of the Pratt-Hewit Corp, vested by its charter and the laws of Texas and Delaware (latter being the state of its incorporation) with the directors of the corporation, to the directors of the corporation's competitor, the defendant Houston Oil Company, said contract being also violative of public policy and therefore void, which refusal of the Court *necessarily resulted in*

(a) depriving petitioner and the stockholders and the Pratt-Hewit Corp of their valuable oil prop-

erties without a judicial determination, upon which alone such deprivation could be justified, all in violation of the "due process clause" of the 14th Amendment.

(b) denying to petitioner and stockholders "the privileges and immunities" to which they were entitled as citizens of the United States under the 14th Amendment, namely, to have been accorded a judicial determination of that question, the denial of which resulted in the loss of their property.

The refusal of the Court of Civil Appeals to determine each of the other five jurisdictional questions presented by petitioner's motions resulted in the same unconstitutional invasion of the rights and taking away of the property of petitioner, the stockholders, and the corporation without a judicial determination of each issue upon which alone such deprivation could be justified. For brevity's sake a mere short statement of each issue will be given here.

Question 2. The September 28, 1925 contract violates the Texas Usury Statute.

Question 3. The Contract violates Texas Anti-Trust and Anti-Monopoly Statutes.

Question 4. The Contract is void because Thomas H. Pratt, by having secret financial personal dealings which were of great profit to him financially, before and after the contract was made, had disqualified himself from making the contract.

Whatever makes the Contract void necessarily makes the judgment of January 26, 1937 void.

Question 5. The judgment of dismissal of the case with prejudice attempted to be entered January 26, 1937, in vacation time, without giving petitioner or his attorney notice and without giving notice to the 400 stockholders, was void as to petitioner and the 400 stockholders, except as to the four or five who intervened, if such judgment were otherwise valid, which petitioner specifically dénies.

Question 6. The judgment of dismissal with prejudice attempted to be entered on January 26, 1937 is void as to the Pratt-Hewit Corp, the true plaintiff, because it did not give its consent to take up the same in vacation and did not give its consent to enter a judgment of dismissal with prejudice by some agent or officer not disqualified from representing the Pratt-Hewit Corp, because Thomas H. Pratt and his private attorney, the former being a defendant who did attempt to represent the Pratt-Hewit Corp, were disqualified from representing the Pratt-Hewit Corp in consenting to take up the case in vacation time and consenting to a judgment of dismissal with prejudice.

VI.

ARGUMENT

Summary of Argument

Four of petitioner's motions are each to the one

effect, namely: that the alleged September 28, 1925 contract, the cancellation of which is the subject of this litigation, is void.

It requires only a reading of the instrument to demonstrate its invalidity and, therefore, is a mere nullity, in legal effect no contract at all, conferring no rights on the defendant, Houston Oil Company, and taking none away from the Pratt-Hewit Corp.

The Contract being void, it follows that the alleged judgment attempted to be entered upon it by the State district court at Refugio County, Texas "dismissing the case with prejudice" on January 26, 1937, is equally void.

The other two motions of petitioner are each to the effect that the said judgment attempted to be entered upon the void Contract is additionally void of itself on its face, as an inspection of the judgment itself will readily disclose.

The Contract being void

> (a) ". . . . nothing can be acquired or lost by it; it neither bestows nor extinguishes any rights, *and may be successfully assailed whenever it is offered as the foundation for the assertion of any claim or title.* It neither binds nor bars anyone. All acts performed under it and all claims flowing out of it are void. The parties attempting to enforce it may be responsible as trespassers. The purchase at sale by virtue of its authority finds himself without ti-

tle and without redress. (citing Hollingsworth v. Bagley, 35 Tex. 345). No action on the part of the plaintiff, no inaction upon the part of the defendant, no resulting equity in the hands of third persons, no power residing in any legislative or other department of the government, can invest it with any elements of power or of vitality. *It does no terminate or discontinue the action in which it* was entered, nor merge the cause of action; and it cannot prevent the plaintiff from proceeding to obtain a valid judgment upon the cause, *either in the action in which the void judgment was entered or in some other action.* The fact that the void judgment has been affirmed on review in an appellate court (citing Chambers v. Hodges, 23 Tex. 104) or an order or judgment renewing or reviving it entered adds nothing to its validity. Such a judgment has been characterized as a dead limb upon the judicial tree, which may be chopped off at any time, capable of bearing no fruit to the plaintiff but constituting a constant menace to the defendant." Freeman on Judgments, 5th Ed. Vol. I, Sec. 322, p. 643; 25 Tex. Jur. 693. See many cases cited in footnote.

Syllabus: "The *affirmance* by this court *of a void judgment imparts to it no validity;* and *it be may be vacated*, and *its execution enjoined*, at any time." Chambers v. Hodges, (Sup. Ct. Texas) 23 Tex. 104.

From the foregoing it necessarily follows that

(a) affirmative defenses, such as lapse of time, laches, limitation, stale demand, estoppel, ratification, confirmation, waiver, want of due diligence,

and res judicata may not be pleaded as a defense to the setting aside of a void contract and judgment. Where no right has ever existed of any kind or nature there is nothing upon which such defenses can attach or act. The mere pleading of those defenses possesses no creative power supplying the necessary inchoate right on which alone those defenses depend for their potency. 25 Tex. Jur. 643; *Paul* v. *Willis, et al*, 69 Tex. 261, 7 S. W. 357.

> "Though a proceeding to vacate a judgment and set aside a sale made thereunder must be instituted in the court by which the judgment was rendered, *yet it is otherwise if the pretended judgment was an absolute nullity by reason of the fact that jurisdiction has never attached.* Bender v. Damon, 72 Tex. 92; 29 S. W. 747." 11 Cyc. Tex. Rep. 127.

(b) In as much as the September 28, 1925 contract and the judgment entered thereon are both void "jurisdiction has never attached," it follows that *petitioner's motions present jurisdictional questions.* By reason thereof it *became the duty of each court* to which those questions were presented to pass upon those issues before proceeding any further. In this the Court of Civil Appeals completely failed.

The question presented by the petition for certiorari is, whether the failure of the Court of Civil Appeals to judicially determine the several fundamental and jurisdictional issues contained in petitioner's motions presented to said court, all to the

effect that the alleged September 28, 1925 contract is void and the judgment entered thereon is void on its face, *necessarily operated to wrongfully deprive* petitioner, the stockholders, and the corporation of their valuable oil property without there first being had a judicial determination of said issues, upon which alone such taking could be justified. Such procedure of the Court of Civil Appeals denied to them

(a) the "due process of law" guaranteed to them by the 14th Amendment of the Constitution of the United States, and

(b) also denied to petitioner and the stockholders "the privileges and immunities" to which they are entitled as citizens of the United States in violation of the 14th Amendment of the Constitution of the United States.

The Affirmative of the Foregoing Question is Fully Sustained by the Following Case Fayerweather v. Ritch

Fayerweather v. *Ritch*, 195 U. S. 276, 25 Sup. Ct. 58, 49 L. Ed. 193.

Fayerweather made a will containing 10 articles. The first 8 dealt with benefits left for his wife and two nieces, his nearest of kin and heirs at law. By the 9th article he gave a sum of $2,100,000 to be divided between 20 colleges. By the 10th he gave

the residue of his estate to his executors as trustees directing them to divide it equally among the colleges named in the 9th bequest.

At that time, according to New York law, a testator having husband, wife, child, or parent was forbidden to give to literary or benevolent institutions more than ½ of his estate.

Later the testator made a codicil to his will by which he revoked the 10th article and gave the residuary of his estate absolutely to his executors.

A few years later the testator died, at which time his estate amounted to 6 million.

When the will and codicil were propounded for probate the widow and nieces filed objections. The Surrogate Court admitted the will to probate but continued the contest as to the codicil.

The three executors executed a deed of gift by which they gave all the property left to them by testator to several parties named in the deed.

Thereafter the executor entered into a written agreement with the contestants by which the amount the latter were to receive under the will was increased and contestants agreed to withdraw their objections to the probate of the will and codicil when the codicil was also admitted to probate.

Then later the widow and the two nieces each gave the executors written releases.

A couple of years thereafter five of the colleges named in article 9 commenced suit against the executors and also executors of the will of Mrs. Fayerweather who had since died, the donees in the executors' deed of gift, the two nieces and the colleges of the twenty who did not join as plaintiffs.

The contention of the five colleges was that the codicil which gave the residue of the estate to the three executors, absolutely, was made in pursuance of an agreement that they should take the residue in trust for the colleges mentioned in the will and distribute it among them.

The donees answered and asserted the validity of the will.

The widow's executors and the nieces by their answer said that the agreement which the court was to enforce was a secret trust to evade the New York statute and that the releases were obtained from them by concealment and fraud, and therefore of no obligation.

The Supreme Court decreed that the residuary estate passed to the executors in trust for the colleges named in the 9th article of the will.

There was no formal finding of fact and no mention made in the decree of the specific claim of execu-

tors of Mrs. Fayerweather's will and the nieces that the releases were fraudulently obtained.

An appeal was taken to the Supreme Court Appellate Division which affirmed the decision.

A further appeal was taken to the Court of Appeals which also affirmed the judgment. A motion was made in this court to amend the remittitur so as to direct the Justice of the Supreme Court to consider the evidence given before him at the trial concerning releases *and to determine whether the said releases were valid and binding*, or invalid and void, which motion was denied.

Thereafter the two nieces instituted a suit in the Circuit Court of the United States making substantially all parties to the suit in the state courts defendants in this suit.

The complaint substantially was that plaintiffs in the state courts had alleged that the releases had been obtained fraudulently and were not binding on them; that thereupon it "became the duty of said court to adjudge and determine whether the releases therein described were invalid and whether these complainants were entitled an affirmative relief thereto." Neither did the Appellate Court of New York mention or pass upon that issue.

To the bills of plaintiffs in the Circuit Court of Appeals the defendants pleaded res judicata. This

was accompanied by an answer denying the fraud.

The Circuit Court sustained the plea and dismissed the bill.

Justice Brewer in writing the opinion of the Supreme Court of the United States sustaining the jurisdiction of the United States Supreme Court, said:

> "The contention is that by Article V of the Amendment to the Federal Constitution no person can be 'deprived of life, liberty, or property, without the due process of law'; that these plaintiffs were entitled to large shares of the estate of Daniel B. Fayerweather; that *they were deprived of their property by the judgment* of the Circuit Court, *which gave unwarranted effect to a judgment of the state courts;* that *this action of the Circuit Court is not to be considered mere error in the progress of a trial, but a deprivation of property under forms of legal procedure.* In Chicago, Burlington, etc. Railroad v. Chicago, 166 U. S. 226, *we held* that *a judgment of a state court might be here reviewed if it operated to deprive a party of his property WITHOUT the due process of law,* and that the fact that the parties were properly brought into court and admitted to make a defense was not absolutely conclusive upon the question of due process. *We said: 'But a state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statutes prescribing forms of procedure in the courts and give the parties interested the fullest op-*

portunity to be heard, and yet it might be that its final action would be inconsistent with that Amendment. In determining what is due process of law regard must be had to substance, not to form.' This court, referring to the Fourteenth Amendment, has said: 'Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the State is of no avail, or has no application where the invasion of private rights is effected under forms of state legislation,' Davidson v. New Orleans, 96 U. S. 102. The same question could be propounded, *and the same answer made, in reference to judicial proceedings inconsistent with* the requirements of due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the Fourteenth Amendment, *then the final judgment of a state court, under authority of which the property is in fact taken, is deemed the act of the state within the measuring of that Amendment.*"

And again (pp. 236, 237):

"'The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, *if the necessary result be to deprive him of his property without compensation.*"

"If a judgment of a state court can be reviewed by this court on error upon the ground that, *although the forms of law were observed, it necessarily operated* to wrongfully deprive a

party of his property (as indicated by the decision just referred to) a judgment of the Circuit Court of the United States claimed to give such unwarranted effect to a decision of a state court as to accomplish the same result, may also be considered as presenting the question how far it can be sustained in view of the prohibitory language of the Fifth Amendment, and thus involve the application of the Constitution. It is said that the right of these plaintiffs to share in the estate of Daniel B. Fayerweather is undoubted, unless destroyed by the releases they executed; that the fundamental question presented in the trial court of the state was the validity of those releases; that *notwithstanding this that court came to its conclusion and rendered its judgment without determination thereof;* that the appellate courts wrongfully assume that the trial court had decided the question, and rendered their judgments upon that assumption, so that the necessary result of the proceedings in the state courts was a deprivation of the rights of the plaintiffs to a share of the estate, *without any finding of the vital fact which alone* could destroy their rights. The contention is not that the state courts erred in their finding in respect to this fact, *but that there never was any finding.* Such decision of the state courts, made without any finding of the fundamental fact, was accepted in the Circuit Court of the United States as a conclusive determination of the fact. Although these plaintiffs were parties to the proceedings in the state courts and presented their claim of right, if it be true that the *necessary result of the course of procedure in those courts was a denial of their rights—a taking away and depriving them of their property* WITHOUT ANY JUDICIAL

DETERMINATION OF THE FACT UPON WHICH ALONE *such deprivation could be justified—a case is presented coming directly within the* decision in 166 U. S. supra, giving effect in the Circuit Court to the state judgment does not change the character of the question. *It is simply adding the force of a new determination to one wrongfully obtained,* and adding it *upon no new facts.* Whether the contention of the plaintiffs in respect to the character of the state proceedings can be sustained or not is a question on the merit and does not determine the matter of jurisdiction. That depends upon whether there is presented a bona fide and reasonable question of the wrongful character of the proceedings in the state courts and the necessary result therefrom. We are of the opinion that the jurisdiction of this court must be sustained."

While the legal conclusion based on the facts in the foregoing case are inescapable, yet the fact in the case at bar is even more absolute, and compelling. In the former case all the courts had jurisdiction of the parties and the subject matter. While, in the case now before this Court, no court, state or federal, has had, at any time, jurisdiction of either the parties or the subject matter. The jurisdiction of those courts has never attached to the parties or subject matter for the simple reason there was nothing to which the jurisdiction of those courts could attach. It's all just a nullity.

"A judgment pronounced without any judicial determination of the facts, which alone can support such a judgment is merely an arbitrary

edict of the Judge, and is as much wanting in due process of law as though the party against whom it is entered had received no summons. Chicago, Burlington, etc. R. R. 166 U. S. 226; Fayerweather v. Ritch, 195 U. S. 276, 298; 26 S. Ct. 58, 49 L. Ed. 193."

Hultberg v. *Anderson*, 252 Ill. 607, 97 N. E. 216.

The Right of a Litigant to Have the Court Determine the Issue Presented by Him, Particularly where It Is Charged that the Court is Without Jurisdiction, is a Fundamental Right Protected by the Privileges and Immunities and Due Process Clauses of the Fourteenth Amendment.

"The right to due process of law and exemption from compulsory self-accusation constitutes 'privileges and immunities' secured and protected by the Federal Constitution. USCA Const. Amend. 14 *United States* v. *Sutherland D. C. Ga.* 37 F. Supp. 344, 345." Words and Phrases, Per. Ed. Vol. 20, 1944, Annual Pocket Part. p. 26.

"The words 'privileges' and 'immunities' are of very comprehensive meaning, but it will be sufficient to say that the clause in the Constitution unmistakably procures and protects the rights of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade, or business, without molestation; to acquire personal property; to take and hold real estate; *to maintain actions in the courts of the state;*

Ward v. *State of Maryland*, 79 U. S. (12 Wall.) 418 430, 20 L. Ed. 449." Words & Phrases, Vol. 33, Perm. Ed. p. 781.

"The 'privileges and immunities' referred to in . . . the U. S. C. A. Const. Amend. 14 Sect. 1, prohibiting the abridgement of the privileges and immunities of citizens of the United States, are general abstract personal rights, in their nature fundamental, and pertain to all citizens in free governments, and which they are entitled to enjoy throughout the several states as well as in the state of residence, such as freedom of travel, ..., and *the right to resort to the courts for its protection* without restriction other than those usually affecting all persons. *Strange* v. *Board of Com'rs. of Grant Co.*, 91 N. E. 242, 173 Ind. 640; *Strange* v. *Board of Com'rs of Grant County*, 91 N. E. 506, Words & Phrases, Per. Ed. Vol. 33, p. 782.

"The right to have the state court proceed in trying a case so that the substantial rights of the parties under controlling federal law are protected, and the right to have controlling federal statutes given their true construction or application, as asserted by the party claiming such construction or application, so they will, in the evidence, warrant a judgment for such party, are federal rights or immunities, even though such statutes may not give the claimants a personal or affirmative right that could be enforced by suit against his adversary."

Cyc. Fed. Procedure, Vol. 10, p. 412, Sec. 4986.

See Garrett v. Moore-McCormick Co., 317 U. S. 725, 58 L. Ed. 1564, 63 Sup. Ct. 246. See many cases cited.

Fundamental rights cannot be taken away without due process of law. *Holden* v. *Hardy*, 169 U. S. 389, *Logan* v. *United States*, 144 U. S. 288, *Hurtado* v. *California*, 110 U. S. 535, *Caldwell* v. *Texas*, 137 U. S. 697.

There are private rights beyond the control of the State in every government. *Loan Ass'n.* v. *Topeka*, 20 Wall. 655.

A state has control of the procedure in its courts but cannot deprive citizens of fundamental rights. *Brown* v. *New Jersey*, 175 U. S. 175, *Bertholf* v. *O'Reilly*, 74 N. Y. 515, *West* v. *Louisiana*, 194 U. S. 258.

The main issue presented by petitioner's application for certiorari is predicated upon the six jurisdictional issues which the Court of Civil Appeals refused to determine or even mention. Each issue raises a jurisdictional question of much merit and is sufficient of itself not only to grant this petition but also to win the case on its merits, as will next be shown.

ARGUMENT

First Issue

The alleged September 28, 1925 contract is void

because it unlawfully attempts to delegate all the managerial powers of the Pratt-Hewit Corporation which it possesses by virtue of its charter and the laws of Texas and Delaware (as to the oil properties covered by the contract and which is all the property it has ever had) to be exercised by its own directors and officials, to the directors and officials of its main competitor, the Houston Oil Company, the principal defendant in this case.

The material portions of the contract are to be found in Exhibit 1 (Tr. R. 22 to 27). The entire contract is to be found on pages 876 to 887 of Fed. Tr. R.

Briefly, the September 28, 1925 alleged contract was an instrument whereby the Houston Oil Co. loaned to Pratt-Hewit Corp. various sums of money, possibly, all told, $100,000. The exact amount is not known. Each loan called for 6% interest and provided for the re-payment of the money with interest at a specified date and each loan was secured by a first mortgage lien on all the property, both personal and real, owned by the Pratt-Hewit Corp. The contract also required the Pratt-Hewit Corp to convey to the Houston Oil Co., *without consideration*, an undivided ½ interest in its 23,000 acres of oil and gas leases with two big producing gas wells on the leases, each capable of delivering 80 million cubic feet of gas into the pipe line, and also a ½ interest in all the drilling equipment, and casing, and machinery, and other personal property located on the leases. There is nothing in the contract to

show where the Houston Oil Co. paid one single dollar for this valuable undivided ½ interest. The loans were all paid with interest when they became due. The Pratt-Hewit Corp. was denied the right to drill on the joint leases. That right was reserved solely to the Houston Oil Co. The latter was given also the sole right to decide if and when and where drilling should take place. The Houston Oil Co. also alone had the right to market the gas and oil, fix the price, and name the party to whom the oil and gas should be sold.

The company to which the Houston Oil Company sold and still sells the gas was and is the Houston Pipe Line Company which it created, wholly owns, and completely controls and whose alter ego it is. The Houston Oil Company, in fact, sells the gas to itself. Of all cost of whatsoever nature, each must pay one-half.

The following is taken from "Part II" of the Contract (Tr. R. 22):

> "First Party (Pratt-Hewit Corp) agrees and binds itself to grant, bargain, sell and convey unto Third Party (Houston Oil Co.) an undivided one-half (½) interest in and to all those certain oil and gas leases, as follows: (List of eleven oil leases totaling 23,000 acres, omitted, all situated in Refugio County, Texas). (For this undivided ½ interest the Houston Oil Co. was not required and did not pay one single dollar).

"Said undivided one-half interest in said leases to be conveyed as aforesaid by First Party to Third Party

(1) "together with an undivided one-half (½) interest in all oil and/or gas wells on the property covered by said leases.

(2) "together with the equipment of every kind and character of said wells, and

(3) "together with all personal property on the lands covered by said leases, and used in connection with the development or proposed development thereon.

(4) "So that, and to the end that said leases, said wells, and said equipment shall be owned one-half (½) by First Party and one-half (½) by Third Party.

"Upon the conveyance to Third Party by First Party of the said undivided one-half (½) interest, *Third Party* (Houston Oil Co.) shall have the exclusive right

(1) "to operate and produce oil and/or gas from the wells on said property, and

(2) "to the use of the equipment used in connection with said wells, and

(3) "to *contract* and *sell*, and

(4) "*sell* such production,

(5) "receive the proceeds of sale, and

(6) "do any and all things in connection with the handling and management thereof *as Third Party may deem best.*

(7) "Third Party shall also have the *exclusive* right to drill other wells for the production of oil and/or gas, on said property, and

(8) "Third Party shall proceed to develop and produce oil and/or gas therefrom *as and in the manner Third Party may deem best.*

(9) "*the intention being that the opinion and judgment of Third Party* as to such development *SHALL CONTROL.*

"All of the costs and expenses incurred by Third Party

(1) "in operating and producing oil and/or gas from the wells now on said property, and

(2) "in drilling additional wells and producing oil and/or gas therefrom, and

(3) "in marketing oil and/or gas

(4) "and all other costs and expenses incident thereto or by reason thereof, shall be borne one-half (½) by First Party and one-half (½) by Third Party.

(5) "The proceeds of the sale of oil and/or gas from all such wells shall be owned one-half

(½) by First Party and one-half (½) by Third Party."

(6) "Should minerals other than oil and gas be produced from said property, then same shall be owned in the same proportion, and produced, handled and sold in the same manner as oil and gas."

These two above quoted paragraphs in themselves make the Contract void, because

(a) By this instrument the officers and directors of the Pratt-Hewit Corp. have attempted to divest themselves of all the managerial powers and the duties they owe their corporation vested in them by Texas and Delaware statutes and the charter of their corporation and have attempted to delegate those powers and the duty going with them to the directors and officials of the Houston Oil Co., a competitor in the same area, leaving themselves stripped of everything except the clerical duty to distribute among the stockholders whatever the Houston Oil Co. shall choose to give them. Thus, for a period of nearly 20 years the directors and officials of the two Pratt-Hewit Corporations have had nothing to do except to be the "rubber stamp" of the officials of the Houston Oil Co. and to distribute among the stockholders of the Pratt-Hewit Corp. the allotted dividends that total to the magnanimous amount of 8½ per cent. (F. Tr. R. 707).

The Pratt-Hewit Corp, under this Contract, does not have the right to drill for oil or gas on its own

property—a right which every tenant-in-common has at all times, assuming that the contract is legal, which petitioner denies. Consequently, if the Houston Oil Co. decided not to do any drilling in any one year or period of years, there is no provision in the contract which would compel it to do so, for there is no provision in the contract which compels the Houston Oil Co. to produce a minimum amount of gas or oil each year, nor is there any provision that a certain amount of development drilling must be done each year—*all that is left to the discretion of the directors of the Houston Oil Co.*

These provisions, contained in the foregoing quoted paragraphs of the alleged contract, vest with the Houston Oil Co. the exclusive right to operate and produce oil or gas from the alleged joint property, to use the Pratt-Hewit Corp's equipment situated on the properties, "to contract to sell and sell such production, receive the proceeds of sale, and to do any and all things in connection with the handling and management thereof as the Third Party (Houston Oil Co.) may deem best." . . . . . The Houston Oil Co. was also given the EXCLUSIVE RIGHT to drill other wells for the production of oil or gas. "*Intention being that the opinion and judgment of the Houston Oil Co.* as to such development SHALL CONTROL." All costs and expenses incurred in operating and producing oil and gas, and marketing the oil and gas, and all other costs and expenses incident thereto shall be borne ½ *by the Pratt-Hewit Corp.* and ½ by the Houston Oil Co. Likewise, the proceeds of the sale of oil and gas should be owned

½ by the Pratt-Hewit Corp. and ½ by the Houston Oil Co. There is no time limit placed as to these provisions, and, it therefore means that as long as oil and gas and other minerals may be produced from said property the contract, if it were legal, would be enforced.

. . . . . .

(b) By this Contract the Houston Oil Co was given the *exclusive right* to market the oil and gas and other minerals sold at a price determined by the Houston Oil Co. alone and sold to the party which the Houston Oil Co. alone had the right to select.

Attention is called in particular to that part of the Contract which vests with the Houston Oil Co. the *exclusive right* "to contract to sell, and sell such production, receive the proceeds of sale." This phraseology carries with it the *right to fix the price* without in any way consulting the alleged co-tenant, the Pratt-Hewit Corp. The Houston *Pipe Line* Company, to whom the gas was and is sold, was organized by the Houston *Oil Co.* in 1925, and is the *alter ego* of the Houston Oil Co. See paragraph XIV of the Proposed Amended Original Petition of F. F. Dollert (Tr. R. 19). *Consequently, the Houston Oil Co. was and is fraudulently selling* the gas produced *to itself. It*, therefore, *sits on both sides of the bargaining table when the price of gas is fixed.*

(c) The Houston Oil Co. sold the gas to itself —The Houston Pipe Line Company—the *alter ego* of the Houston Oil Co.

Paragraph 28 of Plaintiff's Second Amended Complaint (Fed. Tr. R. 336, 337) in the Federal District Court, reads as follows:

"(28) The plaintiff alleges the allegations in this paragraph upon information and belief, as follows: The Houston Pipe Line Company is the second self —the alter ego—of the Houston Oil Company. The latter owns all the stock of the former and brought about its incorporation, and furnished it with funds. The two companies have the same directors, except that the Houston Pipe Line Company has fewer in number. The two companies have the same secretary treasurer. They also have the same office files, and occupy the same office space. Each year the two companies issue a joint financial set-up. The officers and directors of the parent company, the Houston Oil Co., dominate and control the affairs and business of the Houston Pipe Line Company so that the latter is but a mere instrumentality and a screen for the other. The Houston Pipe Line Company on or about March 12, 1925 was organized by the Houston Oil Company about the same time that the contract of September 28, 1925 was being contemplated by the officials of the Houston Oil Company and Thomas H. Pratt. The natural gas which the Houston Oil Company, since September 28, 1925, produced and now produces from the wells it operates on the Pratt-Hewit Oil Corporation (Delaware) properties, is sold by the Houston Oil Company to the Houston Pipe Line Company which perpetrates a fraud, in that it represents that it is sell-

ing the gas of the Pratt-Hewit Oil Corporation (Delaware) to a third, separate and distinct party, when, in fact, the transaction means a sale of gas to itself and that the Houston Oil Company is both buyer and seller and has absolute power to fix the prices and also to make a charge in the nature of a profit in the marketing of the gas which the September 28, 1925 contract forbade." (Fed. Tr. R. 336, 337) (Paragraph XIV of petitioner's proposed Amended Petition is the same except as to a minor addition.)

The answer of the Houston Oil Company and the Houston Pipe Line Company in the Federal case, the latter being a defendant in that case, to said paragraph 28 and 29 reads as follows:

"(28) As to Paragraph 28 thereof; and (Fed. Tr. R. 373)

"(29) As to Paragraph 29 thereof:

> "These defendants allege that the Houston Pipe Line Company is a separate and distinct corporation from the Houston Oil Company of Texas, and that it was incorporated under the laws of the State of Texas, and that though some of the officers and directors of the two corporations are the same, each has its own offices and records, and each conducts its own business." (Fed. Tr. R. 373, 374)

According to the Rules of the Federal Practice, the rule has always been and still is that every alle-

gation in plaintiff's complaint which is well pleaded is admitted.

The answer contains a negative pregnant in that it does not unequivocally deny the allegations of the complaint and therefore is pregnant with admissions of the Material Allegations in the paragraph.

An oil company whose directors and officials do not have the right to manage the production and marketing of its own oil and gas but must defer to the judgment of the officials of some other company, a natural competitor, has left its success entirely within the hands and control of such other company.

According to both Texas and Delaware statutes, the last being the state in which the Pratt-Hewit Corp is organized, the officers and directors of a corporation may not delegate the powers vested with them by the charter of their corporation and the statutes of the state in which the corporation is incorporated or in which it carries on its business to the officials and directors of another corporation. Such a contract is void in its inception.

Art. 1327 of the Texas Vernon Statutes, provides that—

> "The directors shall have the general management of the affairs of the corporation, etc."

Revised Code of Delaware, Laws of 1935, Corporation Art. 2041, provides:

"The business of every corporation organized under the provisions of this chapter shall be managed by a board of directors, except as hereinafter or in its certificate of incorporation otherwise provided." etc.

"The general management of the affairs of a corporation having been entrusted by the legislature to the board of directors, it accords with general principle to hold that *their functions may not be delegated to others.*" 10 Tex. Jur. 954, Sec. 303. See other cases cited.

"Upon this statement the question arises, can the board of directors of a corporation, under a charter which imposes upon it the entire management of its affairs, confer that authority upon an executive committee, to be appointed by the president of the company? Undoubtedly, the board of directors can appoint an agent whether in the form of committees or as single agents, to transact the ordinary business of the corporation; but we believe the rule is well settled by authority, and sustained by sound principle, that a *board of directors* CANNOT CONFER UPON OTHERS THE POWER TO DISCHARGE DUTIES IMPOSED UPON THEM WHICH INVOLVE THE EXERCISE OF JUDGMENT AND DISCRETION, *except* in the transaction of ordinary business of the corporation, UNLESS authorized so do to by the charter. Thomp. Corp. Sec. 3944, et seq; Green's Brice, Ultra Vires, pp. 490-492; Railroad Co. v. Ritchie, 40 Me. 425; Tippets v. Walker, 4 Mass. 595; Weidenfeld v. Railroad Co., 48 Fed. 615. The by-laws in express terms substituted the executive committee, to be appointed by the

president, for the board of directors, and attempted to confer upon that committee all powers given by the charter to the board of directors. Such a provision in the by-laws is so palpably in conflict with the charter under which the corporation was organized that there could scarcely be a question that the by-laws would be absolutely null." Temple v. Dodge, et al, 32 S. W. 514 (Tex. Sup. Ct.)

"The power to manage the affairs of the corporation was placed by statute and by charter in the Board of directors (Art. 1327, R. S. Texas, 1925), and such authority CANNOT BE DELEGATED TO ANOTHER (Temple v. Dodge, 32 S. W. 514, 33 S. W. 222), and those who deal with a corporation are charged with knowledge of the limitations upon its powers prescribed by its charter." Farmers' Gin Co. v. Kasch, 277 S. W. 756, 749 (Tex. Civ. App.)

"Further, in Temple v. Dodge, et al, 89 Tex. 69, 32 S. W. 514, 33 S. W. 222, it was held that the board of directors cannot delegate to others authority to discharge the duties imposed upon them by law, *involving the exercise of judgment and discretion*, except in the transaction of ordinary business of the corporation, unless authorized so to do by its charter. To the same effect, see Fletcher on Private Corporations, Vol. 3, pp. 31, 48." Marchman v. McCoy Hotel Operating Co., 21 S. W. (2d) 552, 558 (Tex. Civ. App.).

In the case of *Sherman & Ellis, Inc.* v. *Indiana Mutual Gas Co., et al.*, 41 Fed. (2d) 588 (7th Cir.), the court HELD VOID an agreement made between

the Sherman & Ellis Inc. and the Indiana Mutual Casualty Company in which the Casualty Company conferred the management of its affairs upon the Sherman & Ellis, Inc. *for a period of* 20 *years.*

The Court said: (Evans, Circuit Judge)

"It is true the statutes of the states authorizing the organization of corporations are of a general application and are easily complied with. Yet we cannot believe that the requirements therein found or the official duties therein prescribed are mere formalities or only directory in character . . . . . *The grant of a corporate power by a state is upon the hypothesis that these powers shall be exercised by the corporation's officers,* annually elected by the stockholders, and not by the officers of another corporation." Anglo-American Land, etc. Co. v. Lombard (CCA) 132 F. 721, 736.

"The state is presumed to grant corporation franchises in the public interest, and to intend that they *shall be exercised through proper officers and agencies of the corporation and does not contemplate that the corporate powers will be delegated to others. Any conduct which destroys their functions or cripples their separate activity, by taking away the right to freely and independently exercise the functions of their franchises, is contrary to public policy.*" McCutcheon v. Merz Capsule Co. (CCA, 6th) 71 F. 787, 793. The Circuit Judges were Taft, Lurton and Hammond.

". . . . . *a contract not within the scope of the powers conferred on the corporation CAN-*

NOT BE MADE VALID by the assent of everyone of the shareholders, nor can it by any partial performance become the foundation of a right of action." Thomas v. Railroad Co., 101 U. S. 71, 83.

This issue, although presented to the courts, federal and state, has never been discussed by defendants' attorneys in brief or otherwise. Nor has any court mentioned the issue or determined it.

SECOND ISSUE

The September 28, 1925 Contract Violates the Texas Usury Statute and Therefore is Void

The September 28, 1925 contract violates the Usury statutes of Texas and, therefore, is void. It was neither an oil and gas lease assignment nor an oil and gas operating contract but a pure loan contract. It provided for four different loans of money by the Houston Oil Company to the Pratt-Hewit Corp. Each carried interest at the rate of 6% per annum and was secured by the Pratt-Hewit Corp. giving a mortgage upon all of its property, real and personal, which it had left after conveying a one-half undivided interest to the Houston Oil Company pursuant to said alleged contract and which consisted of 23,000 acres of oil and gas leases on which there were two producing wells, each capable of putting into the pipe line eighty million cubic feet of gas per day (see Testimony of A. D. Rooke, F. Tr. R. p. 836) plus much pipe line, and very valuable drilling equip-

ment. Each one of these loans was repaid with interest when it became due. The Houston Oil Company alone, by virtue of The Contract, had the right to drill for, produce, and market the oil and gas, and by the contract also had the right to apply the proceeds from said production to repay the loans to itself out of the production share going to the Pratt-Hewit Corp.

For the making of these loans the Houston Oil Company exacted a **bonus** from the Pratt-Hewit Corp requiring the latter to convey to it an undivided one-half interest in the 23,000 acres of oil and gas leases; in the two big gas producing wells on this acreage; all of the drilling equipment owned by the Pratt-Hewit Corp; the pipe lines of the Pratt-Hewit Corp, and a one-half interest in ALL of the production coming from the two producing wells, and the wells to be drilled thereafter. NOT ONE SINGLE DOLLAR WAS PAID FOR THIS ONE-HALF INTEREST BY THE HOUSTON OIL COMPANY to the Pratt-Hewit Corp.

The Contract is usurious in that the loans all carried 6% interest and **the giving** to the Houston Oil Company a **one-half interest in the leases,** the two producing wells each capable of producing 80 million cubic feet of gas per day, (F. Tr. R. p. 836) and equipment, raised the interest rate far in excess of 10% and is, therefore, prohibited by Art. 5069 of the 1925 Texas Statutes, which says:

"Usury is interest in excess of the amount

allowed by law (10 per cent); all contracts for usury are contrary to public policy and shall be void."

There was another provision in the Contract which was to the effect that, as to the two producing wells, No. 4 and No. 6, the proceeds from the first production from these wells, to the extent of ing wells, No. 4 and No. 6, the proceeds from the $120,000, the Houston Oil Company was to apply to paying itself the loans which it had extended to the Pratt-Hewit Corp. (Fed. Tr. R. 881)

In fact, all of this $120,000 is paid by the Pratt-Hewit Corp. Sixty thousand ($60,000) dollars of this comes from the remaining undivided one-half interest the said corporation had after the Contract was executed. **The other $60,000 did not come from the treasury of the Houston Oil Company** BUT FROM THE PRODUCTION coming from the undivided one-half interest which the Houston Oil Company claimed by virtue of the alleged and void Contract —a gift to it by Pratt and the directors of the Pratt-Hewit Corp. That claim of the Houston Oil Company assumes the legality of the September 28, 1925 contract—**the question in dispute**. That claim of the Houston Oil Company "begs the question."

For the Houston Oil Company to give back to the Pratt-Hewit Corp. that which the Houston Oil Company, in the first place, had no right to exact from the latter **does not constitute a consideration**.

Art. 5071, Texas Statutes, says:

> "The parties to any written contract may agree and stipulate for any rate of interest NOT EXCEEDING ten percent per annum on the amount of the contract, and all written contracts whatsoever, which may in any way, **directly or indirectly**, provide for a greater rate of interest SHALL BE VOID and of no effect for the amount of interest only; but the principal sum of money or value of the contract may be recovered."

Judge Hutcheson of the Fifth Circuit Court of Appeals, and who is a member of that court coming from Texas, in the case of Atwood v. Deming Inv. Co., 85 Fed. (2d) 180—a suit involving the just quoted Texas Statutes, said:

> "For us, the statute (Art. 5071) has the meaning which the highest court has given it. We follow where the court has led."

> The courts of Texas have always struck such contracts down, and neither sophistry of form nor substance has availed to save them. The reasons for this, the Supreme Court of Texas in the cases referred to, have been fully set out. We shall not attempt a restatement; a reference to these cases will suffice."

> "The language of the statute, that such contracts shall be void as to interest, is imperative and absolute, not prospective and conditional. It provides not that the contract will, but that it shall, be void and of no effect as to interest. Such

a statutory interdiction sweeps the provisions for interest out of the contract, and leaves it as though it did not stipulate for the interest." (p. 183)

The application of these statutes and decisions of the courts of Texas to the September 28, 1925 contract, means that the actual money, the principal checked out by the Houston Oil Company out of its bank account in making the loan must be and **was paid back** to the Houston Oil Company by the Pratt-Hewit Corp for that part of the contract has the sanction of the laws of Texas. Principal with interest was fully paid. The interest part of the contract is completely condemned by the two Texas statutes just quoted and the decisions of the Texas Supreme Court. The void part includes two items which cover all the rest of the Contract, namely, first, the 6% interest provided for by the written loans and second, the undivided one-half interest in all the real and personal property conveyed to the Houston Oil Company by the Pratt-Hewit Corp., according to Texas laws, is interest, thus bringing the rate far above the 10 per cent allowed. This makes the Contract, as to all interest—the 6 per cent, as well as the undivided one-half interest conveyed to Houston Oil Company by Pratt-Hewit Corp, void. Thus, in fact, the Houston Oil Company at no time acquired ownership of the one-half interest it received from the Pratt-Hewit Corp. As to this one-half interest, and all the production therefrom, the Houston Oil Company is a **mere constructive trustee** with the Pratt-Hewit Corp the cestui que trust.

In the case of Manning, et al v. Christianson, et al (Tex. Com. App.) 81 S. W. (2d) 54, the decision of the Court of Civil Appeals was sustained, when the Court said:

> "Entire interest is usurious if any part of interest is usurious. 59 S. W. (2d) 234, in the following language:
>
> "It follows, therefore, the Court of Civil Appeals correctly held that the contract was usurious and that all provisions with references to interest were void."

In the case of Shropshire v. Commerce Farm Credit Co. (Tex. Sup. Ct.) 39 S. W. (2d) 11, (one of the cases quoted by Judge Hutcheson in the Atwood v. Deming Inv. Co. supra) the Supreme Court of Texas said:

> "The court recognizes its duty in determining the validity of the contract herein involved to apply the universally accepted rule declared in Galveston Co. v. Guynes, 63 S. W. 860, 861, 64 S. W. 778, in the following words: 'to determine the question of **usury** in a contract, **it must be tried by the statutory limitations of 10 per cent per annum** for the use, forebearance, or detention of the money for one year. **If the interest contracted for exceeds that rate, it constitutes usury, no matter in what form the contract may be expressed.** The court must give to the terms of the contract, if fairly susceptible of it, a construction that will make it legal, but **has no right to depart from the terms** in which

it is expressed **to make legal what the parties have made unlawful."**

This issue, although presented to the courts, federal and state, has never been discussed by defendants' attorneys in brief or otherwise. Nor has any court mentioned the issue or determined it.

THIRD ISSUE

The contract is void in that it violates the Anti-Trust and Anti-Monopoly Statutes of Texas.

What has just been said in this brief about the September 28, 1925 contract being void because it attempted to delegate all the managerial powers vested with the directors and officials of the Pratt-Hewit Corp, to the directors and officials of the Houston Oil Company, its competitor in the same area, is equally cogent a proof that the contract violates the Anti-Trust and Anti-Monopoly Statutes of Texas.

As has just been seen, the Houston Oil Company, by the Contract

(1) has the exclusive right to control the production of all the oil, gas, and other minerals as long as either is produced from the 23,000 acres, that is **when** and **how much:**

(2) has the exclusive right to market the oil

(a) fix the price,

(b) and decide to whom the oil and gas is to be sold.

If this contract is legal and does not violate the Anti-Trust and Anti-Monopoly Statutes of Texas and of the United States, then it would be legal for the Houston Oil Company to make similar contracts with companies A, B, C, D, E, ad infinitum—an exceedingly easy way of avoiding the Anti-Trust and Anti-Monopoly laws of both state and federal governments and at the same time obtain absolute control of all production and the fixing of all prices and controlling all markets of anything produced or manufactured.

The two paragraphs of Part II of the Contract are not here repeated nor the discussions of the First Issue.

1. Statutory Definitions of Anti-Trust and Monopolies.

Art. 1632, Vol. 3, Vernon's Texas Penal Code, defining trusts—

> "A 'trust' is a combination of capital, skill or acts by two or more persons, firms, corporations or associations or persons, or either two of them for any or all of the follwing purposes:
>
> 1. To create, or which may tend to create or

carry out, restrictions in trade or commerce or aids to commerce, or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this state.

"2. To fix, maintain, increase or reduce the price of merchandise, produce, or commodities, or the cost of insurance, or of the preparation of any product for market or transportation.

"3. To prevent or lessen competition in the manufacture, making, transportation, sale or purchase of merchandise, produce, or commodities, or the business of insurance, or to prevent or lessen competition in aids of commerce, or in the preparation of any produce for market or transportation.

"4. To fix or maintain any standard or figure whereby the price of any article or commodity of merchandise, produce or commerce, or the cost of transportation, or insurance, or the preparation of any product for market or transportation, shall be in any manner affected, controlled or established.

"5. To make, enter into, maintain, execute or carry out any contract, obligation or agreement by which the parties thereto bind, or have bound, themselves not to sell, dispose of, transport or to prepare for market or transportation any article or commodity, ...

. . . .

"7. To abstain from engaging in or continuing

business, or from the purchase or sale of merchandise, produce, or commodities partially or entirely within this state, or any portion thereof." p. 328-329. (Same as Art. 7426 of the Texas Revised Statutes relating to Trusts).

ART. 1633, Vol. 3, Vernon's Texas Penal Code—Defining Monopoly—

"A 'monopoly' is a combination or consolidation of **two** or more corporations when effected in either of the following methods:

"1. When the direction **of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or** where such common management or control tends to create a trust as defined in the first article of this chapter.

"2. Where any corporation acquires the shares or certificates of stock or bonds, franchises or other rights, **or the physical properties,** or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise. (id)" p. 332. (Same as Art. 7427 of Texas Civil Statutes relating to Monopolies).

All agreements and contracts made in violation of the Anti-Trust and Anti-Monopoly statutes are void. Art. 7437, Vernon's Texas Civ. Statutes.

The definite effect of the September 28, 1925 alleged contract was to place the production and marketing of the oil and gas produced on the Pratt-Hewit Corp leases under the absolute management and control of the Houston Oil Co. and thereby eliminate completely and forever, that is, as long as oil or gas or any other mineral is produced in the 23,000 acres, the Pratt-Hewit Corp. as competitor to the Houston Oil Company in producing, selling, and fixing the price at which oil and gas would be sold in South Texas.

> *Headnote:* "A contract for the sale of one corporation to another of all its gas wells, the purpose and effect of which would be to prevent competition between them in supplying gas to communities held to effect an illegal trust and void under this article and Articles 7796 and 7797, and 7807 Vernon Sayles' Ann. Civ. St. Texas, 1914." Empire Gas & Fuel Co. Inc. v. Lone Star Gas, Inc., 289 F. 826.

The Court in the above case on page 832, said:

> "The decision of the courts of Texas construe liberally these anti-trust regulations. If the undertaking between the plaintiff and the defendant would result in a diminution of competition, then and in that event the agreement upon which this action is based, and for the performance of which the plaintiff prays would be illegal and against public policy."

Texas Statutes have greatly enlarged upon the common law pertaining to trusts and monopolies.

"Our anti-trust statutes have materially enlarged upon the common law. They denounce and make illegal, void and criminally punishable almost every conceivable kind of combination or contract which *tends* to restrict trade or commerce." 29 Tex. Jur. 749. North Texas Gin Co. v. Thomas, (Tex. Civ. App.) 277 S. W. 438, Error refused. State v. Gulf Refining Co. (Civ. App. Tex.) 279 S. W. 526, Error refused.

Texas Anti-Trust laws ignore distinction between *reasonable* and *unreasonable* restrictions.

"The act denounces combinations in restraint of trade and makes no distinction between restrictions which are reasonable and those which are unreasonable." Anheuser-Busch Brewing Ass'n. v. Housch (Tex. Sup. Ct.) 88 Tex. 184, 30 S. W. 869.

Courts will not speculate on the extent of the injury resulting to public arising from an illegal trust statute violation.

"The effect on the public of an agreement which is against public policy as defined by the statute is not important: its *tendency* may be enough to bring it within the condemnation of the law. State v. Racine Sattley Co., 63 Tex. Civ. App. 663, 134 S. W. 400. That a contract necessarily and *naturally tends to bring* about the inhibited result is the test to be applied to cases arising under this law. Queen Insurance Co. v. State, 86 Tex. 250, 24 S. W. 397, 22 L. R. A. 483, reversing (Civ. App.) 22 S. W. 1048; Potomac Fire Ins. Co. v. State (Civ. App.) 18

S. W. (2d) 929, Error refused; Uvalde Rock Asphalt Co. v. Chapin-Colglazier Constr. Co. (Civ. App.) 299 S. W. 710, Error refused. Nor does it matter that the immediate result of the combination may be a reduction in the price of commodities. San Antonio Gas Co. v. State, 54 S. W. 289, Error refused. 'If the combination be one to create or carry out restrictions in trade or commerce or aids in commerce, no matter what may be the result of the combination, the law has been violated. *The law does not look to results.*' San Antonio Gas Co. v. State (Supra)." 29 Tex. Jur. 753.

This issue, although presented to the courts, federal and state, has never been discussed by defendants' attorneys in brief or otherwise. Nor has any court mentioned the issue or determined it.

FOURTH ISSUE

The September 28, 1925 contract and the judgment entered thereon, January 26, 1937, are further void because Thomas H. Pratt, the resident manager and dominant stockholder, director, secretary and treasurer of the Pratt-Hewit Corp who attempted to negotiate this contract in behalf of his corporation, had disqualified himself from negotiating that instrument by reason of the undisputed and admitted fact that he had and was having secret private financial dealings with the Houston Oil Company, whereby he was attempting the impossible in law and fact, namely, serving dual conflicting interests.

The Houston Oil Company and its president, E.

H. Buckner, secretly paid to Pratt a sum somewhat more than $51,000 in cash and obtained for him a 3/32 undivided interest in a producing 200 acre oil lease from which he received an income of at least $125,000 up to the time of his death. To show just how this was accomplished, for brevity's sake, reference is made to petitioner's proposed amended petition where the many acts in which Pratt's private interest conflicted with duty are recited. (Tr. R. 10 to 17)

Officers and Directors of a Corporation are Fiduciaries.

"And it is settled law in this state that the officers and directors of a corporation occupy a fiduciary relationship to the stockholders and act in the capacity of a trustee for them. 10 Tex. Jur. 861, Sec. 70, and numerous cases cited in Note 6: also Tex. Jur. 21, Sec. 372." Trinity Universal Ins. Co. v. Maxwell, 101 S. W. (2d) 606, 611 (Appeal dismissed)

An Officer's Right of Representation Ceases the Moment Conflict of Interest Arises, and "The Law Does Not Stop to Inquire whether the Contract was Fair or Unfair".—Justice Cardoza.

In the case of *Nabours* v. *McCord*, 80 S. W. 595, This Honorable Court said:

"*No man can in this court*, as an agent, *be allowed to* put himself into a position in which *his interest and his duty will conflict.*

"*This court will not inquire*, and is not in a position to ascertain, *whether the bank had lost or had not lost* by the act of the directors."

In the same case this Honorable Court gives the reason why the law should be such in a relationship between a fiduciary and his beneficiary, when it said:

"The rule is founded on the *danger of imposition* and the presumption of the *existence of fraud inaccessible to the eye of the court.* The policy of the rule is to shut the door against temptation, and which, in the case in which such relationship exists, is deemed to be itself sufficient to create the disqualification." Nabours v. McCord, supra, pages 598 and 599.

"*A purchase by the trustee may be set aside without regard to its fairness or price paid.* Nabours v. McCord, 97 Tex. 526, 80 S. W. 595, 598, *because*, '*it is poisonous in its consequences*,' Crawford County Bank v. Bolton, 87 Ark. 142, 118 S. W. 398, 400, and *the rule stands 'upon one great moral obligation* to *refrain from placing ourselves in relations which* ordinarily *excite a conflict between self-interest and integrity.*'" Kreis 1. Kreis, 57 S. W. (2d) 1107, 1109, (Tex. Civ. App.)

Justice Rosenman:

"In such a situation (where conflict arises between the interest of fiduciary and that of cestui) the language of Justice Cordoza in Wendt v. Fischer, 243 N. Y. 439, 443, 154 N. E. 303, 304, is apt: 'Finally, we are told that the *broker acted in good faith*, that the *terms*

procured were the best obtainable at the moment, and *the wrong, if any, was unaccompanied by damage.* BUT THIS IS NO SUFFICIENT ANSWER *by the trustee forgetful of his duty. The law 'does not stop to inquire whether the contract or transaction* was *fair or unfair. It stops* the *inquiry when the relation is disclosed, and sets aside the transaction or refuses to enforce it*, at the *instance of the party whom* the *fiduciary undertook to represent, without undertaking to deal with* the *question* of *abstract justice* in the particular case.' Munson v. Syracuse G. & C. R. R. Co., 103 N. Y. 56, 74, 8 N. E. 355; cf. Dutton v. Miller, 52 N. Y. 312, 319. *Only by this uncompromising rigidity has* the *rule* of *undivided loyalty been maintained against disintegrating erosion.'*" Blaustein v. Pan American etc. Co., 21 N. Y. S. (2d) 651, 722.

"The rule is based upon the public policy of removing temptation from the office of a fiduciary, so that it will not be necessary to determine whether it was the interest of the trustee or his sense of duty that prevailed. Different courts have defined this rule in different words, but in unanimity of substance." Blaustein v. Pan Amer. etc. Co., 21 N. Y. S. (2d) 651, 722.

In the case of *Wile, et al* v. *Burns*, 265 N. Y. S. 461, the Court said:

"They say that they have clearly established that no one occupying a fiduciary relation, such as that of a director of a corporation, should place himself in a position where his self-interest *will* or *may conflict with* his *duties* as *trus-*

tee, and that, *if he does do so, his right to represent his cestui ceases at once.*"

All the foregoing cases, including the decisions of Texas courts, restate and fully affirm the Biblical adage that "No man can serve two masters."

The Undivided 3/32 Interest in the A. D. Rooke 200 Acre Lease Presents a Continuous Conflict Between Duty and Self-Interest which is Still Going On.

The attempt to serve dual conflicting interests and the bribing of officials of the Pratt-Hewit Corp, which cannot be severed from the acts which constitute the conflict between interests, still goes on as a challenge to the courage of courts of justice. When the Houston Oil Company and its president, E. H. Buckner, paid Pratt a sum in excess of $51,000 cash, those bribes were completed when the money was paid.

The making by the Houston Oil Company of a gift of an undivided 3/32 interest in the A. D. Rooke lease through the channels of A. D. Rooke and his lease and the drilling contracts made between Rooke and the Houston Oil Company and the assignment by Rooke of a ½ interest in the A. D. Rooke lease for which Pratt paid nothing—that presents a different situation. The nature of that conflict between self interest and duty is far different. The production income could not be paid out at once. That, at its inception, contemplated between Pratt

and the Houston Oil Company that a payment of monthly checks from the production of oil and gas and other minerals coming from the 3/32 interest which Pratt still had left in the A. D. Rooke lease, was to continue so long as oil or gas or other minerals were produced from the Rooke 200 acre lease. This production from that lease commenced about September 1, 1925 and has continued without interruption ever since, during all the time that this litigation has gone on through the federal and state courts and is going on now, that is, the Pratt heirs are receiving a check from the Houston Oil Company every month and the Houston Oil Company, is flaunting its disregard of law and courts while this case is pending before this Honorable Court. Yes, and it was continuing in secret and unbeknown to the stockholders of the Pratt-Hewit Corp and petitioner on January 26, 1937 when this case was dismissed with prejudice by the Honorable J. P. Pool. Pratt and his family have received the $51,000 and the $125,000 and this income from this 3/32 interest, but the distant investors who put about $500,000 into this venture, dating back to 1920, have received a total income on their investment of 8½%.

The Houston Oil Company's giving and Pratt's accepting the 3/32 interest in the A. D. Rooke lease at the time that the deal was made in 1925 contemplated that these checks were to be paid by the Houston Oil Company and were to be received by Pratt as long as oil and gas were produced on the A. D.

Rooke lease. This constituted a continuous conflict between Pratt's interests and his duty to his corporation. After Pratt's death, September 3, 1938, the conflict between interest and duty continued through M. A. Shaw, Pratt's son-in-law, who became the president and one of the directors of the Pratt-Hewit Corp and is still such president and who received a large block of stock as a gift from his wife, Laura J. Shaw, the daughter of Thomas H. Pratt, who had received it from her father by gift and inheritance, and continued it through George P. Pratt, Thomas H. Pratt's son, who became a director shortly after his father's death and has held the position ever since.

This is not an ancient case but one where the wrong, that is, the unlawful deprivation of petitioner and the stockholders and the corporation of their oil properties without there first having been a judicial determination of the validity of the September 28, 1925 contract, has been going on every day since September 28, 1925 and is still going on today.

This is true, even though petitioner, ever since the discovery of the secret financial dealings between Pratt and the Houston Oil Company, has been knocking at the doors of Justice, his complaint being presented to the courts but being refused a judicial determination of such issue, the unwarranted result being that petitioner et al's property is being continuously taken by the Houston Oil Company in violation of the Due Process Clause and also the privileges and immunities clause of the 14th Amendment of the United States Constitution without a

judicial determination of the issues presented, by which alone such deprivation can be justified.

A crime or a bribe, whether civil or criminal, is continuous when the series of unlawful acts are set on foot by a single impulse and operated by an intermittent force, however long it may occur.

> "A continuous crime is a continuous unlawful act or series of acts set on foot by a single impulse and operated by an intermittent force, however long it may occur. Armour Packing Co. v. United States, 153 F. 1, 5, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400, citing Whar. Cr. Pl. & Practice, 9th Ed. Secs. 473 and 474; People v. Sullivan, 33 p. 701, 704, 9 Utah 194." 9 Words & Phrases, Perm. Ed. 174.

Justice Holmes, in the case of *United States* v. *Kissel*, 218 U. S. 607, 608, 31 S. Ct. 124, 126, said:

> "The defendants argue that a conspiracy is completed crime as soon as formed, that it is simply a case of unlawful agreement, and that therefore the continuando may be disregarded and a plea is proper to show that the statute of limitation has run. Subsequent acts in pursuance of the agreement may renew the conspiracy, or be evidence of a renewal, but do not change the nature of the original offense. So, also, it is said, the fact that an unlawful contract contemplated future acts or that the results of a successful conspiracy endure to a much later date does not affect the character of the crime.

"The agreement, so far as the premises are true, does not suffice to prove that a conspiracy, although it exists as soon as the agreement is made, may not continue beyond the moment of making it. It is true that the unlawful agreement satisfied the definition of the crime, but it does not exhaust it. It is true, of course, that the mere continuance of the result of a crime does not continue the crime. United States v. Irving, 98 U. S. 540. But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and when there is such continuous cooperation, it is a perversion of natural thought and language to call such continuous cooperation of a cinematographic series of distinct conspiracies, rather than to call it a single one."

The monthly payment required that each month the Houston Oil Company tender to Pratt and his heirs their alleged royalty payment and their acceptance of it. Any month either party could have refused its or their part of the cooperation necessary to continuance of the unlawful taking of petitioner's et al's property.

This issue, although presented to the courts, federal and state, has never been discussed by defendants' attorney in brief or otherwise. Nor has any court mentioned the issue or determined it.

The United States District Court, in the Federal case, *Reed* v. *Houston Oil Company et al*, found "There is no evidence of fraud before the Court . . .

. . . in the securing of the contract of September 28, 1925. (Fed. Tr. R. 519) The Circuit Court of Appeals affirmed the decision of the District Court and said "There was no fraud."

The findings of those two courts in no way dispute what has just been said—that Pratt had disqualified himself from negotiating the September 28, 1925 contract by having secret financial dealings with the Houston Oil Company, which are undisputed, thereby placing his private interest in conflict with the duty he owed his corporation, whereby his right of representing his company ceased the moment the conflict arose.

It is the law in Texas and in all the states and under the federal decisions, that a fiduciary's right to represent his cestui que trust ceases the instant the conflict arises, whether or not attended by fraud. Justice Cardozi in *Wendt* v. *Fischer Supra*, (See page 73 in this brief).

In the case of *West* v. *Camden*, 135 U. S. 507, 10 S. Ct. 838, 34, L. Ed. 254, the agreement was one made personally by Camden, a director and stockholder of a corporation, that West should be permanently retained as vice-president of that company at a salary of $5,000 a year. It was not an agreement of the corporation itself. Inasmuch as its breach might readily be presumed to result in the personal liability of Camden for damages, the agreement was of a character to place defendant's personal interests in possible conflict with the best interests of

the corporation and its stockholders, and, as plaintiff knowingly dealt with defendant with respect to the subject matter touching his fiduciary relationship to the stockholders, the contract was manifestly void, *not because a fraud was perpetrated or contemplated, but because the contract was against public policy, even though there would not have been any direct gain to the promisor,* the defendant.

Following is the syllabus in the foregoing case.

> "An agreement by a director of a corporation to keep another person permanently in place as an officer of the corporation is void as against public policy, even though there was not to be any direct private gain to the promisor—not because a fraud was perpetrated or contemplated, but because the contract placed the defendant under direct and very powerful inducement to disregard his duties to the members of his corporation." West v. Camden, 135 U. S. 507, 10 S. Ct. 838, 34 L. E. 254.

In the case of *Nabours* v. *McCord,* 80 S. W. 595, the Supreme Court of Texas said:

> "No man can in this court, as an agent, be allowed to put himself into a position in which his interest and his duty will conflict." p. 600.

> "The court will not inquire, and is not in a position to ascertain, whether the bank had lost or not lost by the act of the directors." p. 600.

The Supreme Court of Texas in the same case

gives the reason why the law must be such in a relationship between a fiduciary and his beneficiary when that Court said:

> "The rule is founded on the danger of imposition and the presumption of the existence of fraud inaccessible to the eye of the court. The policy of the rule is to shut the door against temptation, and which, in the cases in which such relationship exists, is deemed to be itself sufficient to create the disqualification." Nabours v. McCord, 80 S. W. 595, 598, 599 (Tex. Sup. Ct.)

FIFTH ISSUE

This being a stockholders' action, it could not be taken up in vacation time and be "dismissed with prejudice" without notice first being given to petitioner and the rest of the 400 stockholders and the corporation.

No such notice was ever given, as is evidenced by the judgment record. (Tr. R. 32 to 37) Therefore the alleged judgment of January 26, 1937, is void on the face of the record.

> "Judges of the district courts may in vacation, *by consent of the parties*, exercise all powers, make all orders, and perform all acts as fully as in term time, and may, by *consent of the parties*, try any civil case, except divorce cases, without jury and enter final judgment, etc." Art. 1915, Vernon's Tex. Stat. 1928.

This was repealed two years ago. Any judgment

entered dismissing case with prejudice, before the statute was repealed, without consent of all parties, particularly the plaintiffs, and when the action is brought in behalf of a corporation without notice first being sent to the plaintiff who appeared by attorney, and also to all the 400 other stockholders, is void. *Walker, et al* v. *Meyers, et al*, 266 S. W. 499 (Sup. Ct. of Texas)

No notice was sent to petitioner nor to his attorney nor to any of the 400 stockholders in Wisconsin that the case was to be taken up in vacation time and dismissed with prejudice. Petitioner, a doctor who lives in Milwaukee, Wisconsin, testified in the federal case that he had no notice that the case was to be taken up and dismissed with prejudice and knew nothing about it until 18 months thereafter. (Fed. Tr. R. 804)

As the face of the judgment record shows, (Tr. of R. 32 to 37) no procedure of any kind was followed or attempted to be followed by which the rights of the absent stockholders could have been protected. Thus the judgment is void at least as to petitioner and the 400 stockholders who did not appear by attorney when the case was dismissed with prejudice. *Hansberry* v. *Lee*, 311 U. S. 32, 61 S. Ct. 115.

The absentee shareholders and petitioner, as plaintiffs, had the vested right to prosecute the case to judgment when W. E. Hewit refused to do so. That is a property right which cannot be cut off without

a procedure which meets the requirements of the due process clause of the 14th Amendment of the Constitution of the United States. *Hansberry* v. *Lee* (Supra) The record shows indisputably that no procedure of any kind was followed.

What transpired on January 26, 1937, when the case was attempted to be dismissed, is all to be found on two or three pages of the record. See (Tr. R. 32 to 37)

This issue, although presented to the courts, federal and state, has never been discussed by defendants' attorneys in brief or otherwise. Nor has any court mentioned the issue or determined it.

THE SIXTH ISSUE

Thomas H. Pratt being one of the defendants, neither he nor his private attorney could appear in this case for the Pratt-Hewit Corp because of the direct conflict between his private interest and the interest of his corporation.

By reason of the fact that Pratt was a defendant both were disqualified from answering for the Pratt-Hewit Corp or to give its consent to the taking up of the case during vacation time and were also disqualified from consenting to the entering of a judgment "dismissing case with prejudice." The necessary result of this was to take the corporation's and the stockholders' property without the due process of law guaranteed to them by the 14th Amendment of the Constitution of the United States.

The undisputed record shows that in this case Pratt, who was a defendant, and his private attorney, J. V. Vandenburg Jr., answered for the Pratt-Hewit Corp which, although named as a defendant in fact, was the true plaintiff. (Tr. R. 36) (Error in copying name of attorney from the original answer where he signed as J. V. Vandenberge Jr.) Pratt, under oath, verified the petition of the Pratt-Hewit Corp.

Pratt, as a defendant, filed his personal answer which he verified under oath and which also was signed by his private attorney, J. V. Vandenberge. (Tr. of R. 36)

The Honorable J. P. Pool had previously disqualified himself from trying the case, as is shown in the judgment record. (Tr. R. 32)

Stipulations were put on record by attorneys representing W. E. Hewit, plaintiff, and five intervening stockholders, but none representing intervenor, F. F. Dollert, nor any of the other 400 stockholders. These stipulations were also signed by defendants' attorneys. By these stipulations it was attempted to do three things.

(a) That the Hon. J. P. Pool withdrew his statement that he was disqualified from trying the case.

(b) Consent to the taking up of the case in vacation time.

(c) Enter a judgment dismissing the case with prejudice. (Tr. R. 32-37)

The record shows that Thomas H. Pratt, a defendant, and his private attorney, J. V. Vandenberge Jr., unlawfully attempted to represent the Pratt-Hewit Corp, the true plaintiff.

From this it follows that the Pratt-Hewit Corp was not represented by anyone who had authority to appear for it. The judgment on the face of the record of the proceedings had on January 26, 1937, as to the Pratt-Hewit Corp, petitioner, and the 400 stockholders who had not intervened in the case, therefore, is void, on the face of the record.

This issue, although presented to the state courts, has never been discussed by defendants' attorneys in briefs. Nor have the state courts mentioned or determined the issue.

The Alleged Judgment of the District Court, Affirmed by the Court of Civil Appeals, is Obviously Indefinite, Alternative, and Conditional, in fact, is No Judgment at all.

The judgment of the District Court "that said motions be, and they are hereby, dismissed for lack of jurisdiction; and further, that if the Court have jurisdiction over said motions, they are hereby overruled for lack of merit." (Tr. R. 29) is no judgment at all.

The foregoing is an alternative conditional judgment. It does not definitely decide that the Court had jurisdiction. Then again it does not definitely decide that the motions are without merit because it does not know whether it has or does not have jurisdiction. A valid judgment must have finality, at least as to some issue, something which this judgment does not possess. "A judgment must be definitive." 33 C. J. 1102.

"'It is the general rule that judgment must not be conditioned upon any contingency and it has been held that an *alternative* or *conditional* judgment is wholly void.' 33 C. J. 1196, Sect. 1299. 'As a general rule, judgment cannot be in the alternative for one thing or another, but must specifically determine the rights of the parties in a definite manner. 33 C. J. 1197, Sect. 130; *Gathings* v. *Robertson* (Tex. Civ. App.) 276 S. W. 218, *Miller* v *Farmer's State Bank & Trust Co.* (Tex. Civ. App.) 241 S. W. 540; *Ft. Worth Acid Works* v. *City of Ft. Worth* (Tex. Civ. App.) 248 S. W. 822." *Patton* v. *Mitchell* (Tex. Civ. App.) 13 S. W. 2d, 146

Battel v *Lowery*, 46 Iowa 49, 52.

The Court in this case found a garnishee to be liable for one of two amounts to be determined by a future contingency and decreed that plaintiff should recover against the garnishee one or the other of such amounts, according to the event of such contingency. This was held not to constitute a judgment. The Court said:

> "If the finding is alternative, conditional or contingent, the judgment necessarily partakes of the same character. Such a judgment would be an anomaly and serve no useful purpose."

Although the decision of the District Court of Refugio County is not a final judgment, in fact, is no judgment at all, nevertheless, the Court's pronouncement and the procedure followed by the District Court and the Court of Civil Appeals necessarily deprived petitioner, the stockholders, and the corporation of their property without a judicial determination upon which alone such deprivation could be justified, in violation of the Due Process clause of the 14th Amendment and also resulted in denying the petitioner and the stockholders the privileges and immunities to which they were entitled as citizens of the United States.

The Failure of the District Court and the Court of Civil Appeals to Determine whether or not They had Jurisdiction after Their Jurisdiction had been Definitely Challenged, Denied Petitioner et al the Due Process of Law and the Privileges and Immunities as Guaranteed to United States Citizens by the 14th Amendment.

The District Court is the court of general jurisdiction of Texas. It was therefore in duty bound to pass definitely upon the question of whether it did or did not have jurisdiction to pass upon petitioner's motion and not leave that jurisdictional question undecided and hanging in the air where it still is. Its failure to do so and likewise the failure of the

Civil Court of Appeals to do its duty by passing upon the question of whether it had jurisdiction when challeneged by petitioner, resulted in denying petitioner and the stockholders the due process of law and the privileges and immunities to which they are entitled as citizens of the United States, guaranteed to them by the 14th Amendment, all of which deprived them of their property without a judicial determination by which alone such deprivation could be justified.

Galley v. *Hedrick* (Tex. Civ. App.) 127 S. W. 2d 978, 980.

"It has long been the established law of this state that in adjudicating questions of jurisdiction, courts are not bound by allegations of the plaintiff's petition. The rule is that, in the trial of a case, if at any time during its progress it becomes apparent that the Court has no authority under the law to adjudicate the issues presented, it becomes the duty of the Court to dismiss it. Under our system of jurisdiction the rule could not be otherwise because the judgment rendered by a court in a controversy over which the Court does not have jurisdiction is a nullity. If, therefore, after it appears to the Court at some stage of the proceeding that he does not have jurisdiction of the subject matter, he should nevertheless proceed to final judgment, it is obvious the time and effort would be squandered and no purpose whatever would be served. *Able* v. *Bloomsfield*, 6 Tex. 263; *Snyder* v. *Wiley et al*, 59 Tex. 448; *Watson* v. *Baker*, 67 Tex. 48, 2 S. W. 375; *Treaccar*

v. *City of Galveston* (Tex. Civ. App.) 28 S. W. 2d 887."

The Second Part of the Court's Alleged Judgment "that if the Court had Jurisdiction over said Motions, they are hereby Overruled for Lack of Merit, Evidences an Attempt by the Court to Pass upon Facts Not Before It, Resulting in the Taking of Petitioner et al's Property Without the Due Process of Law.

The motions charging (a) that Pratt was disqualified from negotiating the September 28, 1925 contract for his corporation, (b) that the case was taken up during vacation time and dismissed with prejudice without giving any notice thereof to petitioner and his attorney and without giving notice to any of the 400 stockholders and (c) that the Pratt-Hewit Oil Corp, the true plaintiff, was not present through a duly authorized representative when the case was dismissed with prejudice in vacation time because Pratt, who was one of the defendants, and his private attorney, who attempted to represent said corporation, were disqualified from so doing, *present issues of fact.* These facts are all set out in petitioner's proposed amended original petition, (Par. XII, Tr. R. 36) the filing of which was denied by the District Court. The record shows that no testimony was offered or taken on October 8, 1943 when the motions were up for a hearing. (Tr. R. 29 to 37) The record thus shows on its face that petitioner et al were denied the right of having a hearing on those issues of fact as guaranteed to them by the Due Process Clause of the 14th Amendment.

The necessary result of such procedure was to deprive petitioner et al of their property without a judicial determination upon which alone such deprivation could be justified.

Then again it may be asked, did the District Court, by its language mean that the facts stated and alleged in petitioner's proposed amended original petition, particularly the facts relating to Pratt's secret financial dealings with the Houston Oil Company as related in detail in said proposed pleading of petitioner, do not state a cause of action. If so, then it follows that the Court was bound by the rule pertaining to demurrer or motion to dismiss, that all facts well pleaded are assumed to be true. But these facts on their face wholly fail to sustain in any way the Court's alleged finding that the motions "lack merit." As the facts appear on the record, that is, on its face, this Court is not bound by such alleged finding, but must hold as the facts plainly speak, namely, that Pratt was undertaking the impossible and what is inexorably forbidden by all courts, of attempting to serve dual conflicting interests. The truth is that it is impossible to know exactly what the District Court did mean by that finding, except that it tried to write something into the judgment which would be a catch-all.

The necessary result arising from the alleged judgment and procedure of said District Court and the affirmance of the same by the Court of Civil Appeals is (a) that petitioner and the stockholders of the Pratt-Hewit Corp are deprived of their valuable

oil properties without a judicial determination upon which alone such deprivation could be justified, all in violation of the Due Process Clause of the 14th Amendment, and (b) petitioner and stockholders are denied "the privileges and immunities" to which they are entitled as citizens of the United States by virtue of said amendment.

In order that a judgment be on the merits "there must have been either a hearing of some kind or an opportunity for a hearing, at which the merits could have been presented." 26 Tex. Jur. 86, Sect. 388, cases cited. *Southern Nat. Co.* v. *Beck & Bridges* (Civ. App.) 55 S. W. (2d) 215; *Miller* v. *Link Lumber Co* v. *Stephenson* (Civ. App.) 265 S. W. 215, affirmed (Com. App.) 277 S. W. 1039, *Hartford Fire Ins Co.* v. *King*, 31 Civ. App. 636, 73 S. W. 71.

APPLICABLE FUNDAMENTAL PRINCIPLES OF LAW

The expression "face of the record" includes the entire record in the case and is not to recitals in the judgment itself.

"The expression 'face of the record' in proceedings of this kind attacking judgments, includes the entire record in the case, and is not limited to what the judgment recites itself." *Carson* v. *Taylor*, 261 S. W. 824 (Tex. Civ. App.) *State Mortgage Corp.* v. *Ludwig* (Sup. Ct.) 48 S. W. 2d 950.

One void consideration makes the entire contract void.

"We think the effect of the above authorities is to hold that a contract based upon more than one consideration, any one of which is unlawful, whether violative of statutes or the common law, is not divisible so that one of its provisions may be enforced, but the contract as a whole is unenforceable and void." *Hendricks* v. *Wall*, 277 S. W. 207, 210 (Tex. Civ. App.) *Reed* v. *Brewer*, 90 Tex. 144, 37 S. W. 418.

Lapse of time and old age cannot give force to a void judgment. The Supreme Court of Texas annulled a judgment void on the face of its record 40 years after it was entered.

"A void judgment cannot bind anyone, and it is well settled it may be collaterally attacked. Lapse of time cannot aid it or give it any force as a judgment. These administrations being nullities, the heirs of Byrne forfeited no right to set aside, or delay in suing for the land." *Paul, et al* v. *Willis, et al*, 69 Tex. 261, 7 S. W. 357. This case was decided November 8, 1887.

Facts as stated in the Syllabus of the above case:

"A person died in 1836, intestate, leaving as his only property some real estate. Administration was granted in 1846, upon application which did not show jurisdiction, and seven years later administration de bonis non was granted upon application failing to show special reason therefore, and a debt allowed, to satisfy which said real estate was sold. HELD that both administrations were void, and

that the order of sale, being void, may be attacked collaterally."

Judgment in this case was vacated because void, even though forty years had elapsed since it was entered.

"An illegal contract is not subject to ratification.

"If this contract is illegal and against public policy, there is no power which can breathe life or validity into it, and the ratification attempted to be made by the city commission would be void." *Meyers* v. *Walker* (Tex. Civ. App.) 275 S. W. 305, 307.

Res judicata has no application when judgment is void.

"The rule of res judicata has no application where the Court rendering the judgment pleaded in bar did not have jurisdiction of the subject matter or the parties to the action. *Wolfe County* v. *Tolson*, 140 S. W. 2d, 671, 672, 283 Ky. 11." Words & Phrases Per. Ed. Vol. 37 1943 Supp. p. 163.

The Court of Civil Appeals by Its Failure to Pass Upon Petitioner's Jurisdictional Issues "Begged the Questions", that is Assumed without Proof that the September 28, 1925 Contract and the Judgment Entered thereon were Both Valid which in Effect Gave Petitioner et al's Property to the Houston Oil Co. without Any Judicial Determination, in violation of the 14th Amendment.

The opinion of the Court of Civil Appeals (Tr. R. 39 to 42) is to the effect that petitioner's motion charging that the September 28, 1925 contract is

void and the judgment entered thereon is necessarily also void, is (a) a motion for a new trial and therefore comes too late, (b) that it fails to meet the requirements of the bill of review, (c) that the judgments of the State District Court, the United States District Court, and the Circuit Court of Appeals are res judicata, although not one of the reasons and issues presented by petitioner's motion has ever been passed upon or even mentioned by either one of the foregoing courts.

A motion for a new trial, a bill of review, and the affirmative defense of res judicata pleading a former judgment, each one assumes that the court had jurisdiction of the subject matter involving litigation. Petitioner takes issue in his motion with the unjustifiable assumption of the Court of Civil Appeals, as evidenced in its opinion, namely, that the September 28, 1925 contract and the judgment entered thereon are both valid and not void and therefore the State and Federal District Courts, the Circuit Court of Appeals, and the Court of Civil Appeals itself have jurisdiction over the subject matter. Petitioner, in his motion, directly takes issue with the assumption and says that the September 28, 1925 contract and the judgment on the face of the record are void. The Court of Civil Appeals, threfore, begs the question as to each one of the issues presented by petitioner's motion, by its proceeding upon such an indefensible assumption. Thereby said court has failed to perform the duty devolving upon it of determining the issues presented to it.

Neither in the State nor Federal District Court, the Circuit Court of Appeals, nor in the Court of Civil Appeals has any one of the issues presented by petitioner been determined or even so much as mentioned. The effect of this unwarranted procedure of the Court of Civil Appeals in refusing to determine any one or all of said issues has been to deprive petitioner and the stockholders and the Pratt-Hewit Corp of their property without any judicial determination of the issues presented to the Court by petitioner on his motion, upon which alone such deprivation could be justified, in direct violation of the Due Process Clause and the Privileges and Immunities Clause of the 14th Amendment of the United States Constitution.

CONCLUSION

Petitioner charges that the September 28, 1925 alleged contract, whose cancellation is the one subject in this litigation, is void and not voidable. From that it follows:

(a) that any judgment pretended to be entered thereon necessarily is also void on the face of the record;

(b) the District Court of Refugio County never acquired jurisdiction of the property described in said alleged contract;

(c) the decision of the District Court overruling petitioner's motion to set aside the judgment is void. Likewise, the affirmance of the District Court judgment by the Court of Civil

Appeals and the attempt of the Supreme Court, by its alleged denial of petitioner's application for writ of error, thereby holding that the Court of Civil Appeals committed no error, is void;

(d) that the United States District Court of the Southern District at Houston never acquired jurisdiction over the property described in the alleged September 28, 1925 contract, the cancellation of which alleged contract also being the basis of that case. From that it follows that the judgment of the Circuit Court of Appeals, in its attempt to affirm the judgment of the District Court, is also void.

Thus the issues of petitioner are jurisdictional, which made it the duty of each court to have passed on those questions before it proceeded any further.

The result which necessarily followed from these courts not doing their duty presents a federal question of much substance because the inevitable result arising from such failure of duty has been the depriving petitioner, the stockholders and the corporation of their valuable oil properties situated in Texas and giving them to the Houston Oil Company without any judicial determination of the charges of petitioner, upon which determination alone such deprivation could be justified, as required by the Due Process Clause of the 14th Amendment.

Unless this court grants this petition for certiorari and hears and determines each one of these issues, the petitioner, in behalf of his corporation and the other stockholders, is denied that course of legal

proceedings that is in accordance with the law of the land or as expressed by the Due Process of Law clause of the 14th Amendment. In other words, the doors of justice will then have been completely closed to their pleas.

WHEREFORE, petitioner prays that his application for writ of certiorari be granted.

Respectfully submitted

ARTHUR H. BARTELT
Box 190, Austin, Texas
Attorney for Petitioner

DANIEL W. HOAN
152 W. Wisconsin Avenue
Milwaukee, Wisconsin
Of Counsel

LUTHER M. BICKETT
Alamo Nat'l. Bank Building
San Antonio, Texas
Of Counsel